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Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

CHILDREN'S INSTITUTE INTERNATIONAL,
KATHLEEN "KEE" MACFARLANE, CAPITAL CITIES/ABC, INC.
and WAYNE T. SATZ,
Petitioners,

v.

PEGGY MCMARTIN BUCKEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does malicious criminal prosecution support a claim under 42 U.S.C. § 1983 for violation of "substantive due process" rights?

2. Does malicious criminal prosecution support a claim under Section 1983 for violation of equal protection rights, where there is no allegation that the prosecution was undertaken because of the accused's membership in a discrete minority?

3. Does a finding by the California Municipal Court, after a full and fair preliminary hearing, that there was probable cause to prosecute a criminal defendant bar a subsequent claim under Section 1983 based on an alleged malicious prosecution?

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court rule 28.1, petitioners list the following parent companies and non-wholly-owned subsidiaries:

For Petitioner Children's Institute International, Inc.: None

For Petitioner Kathleen "Kee" McFarlane: None

For Petitioner Capital Cities/ABC, Inc.:

English Sports, Inc.; ESPN Asia, Ltd.; ESPN 88; ESPN Enterprises, Inc.; ESPN, Inc.; New York Farm Show, Inc.; Starbird Satellite Services Ltd.; Transcontinental Television, Inc.; Worldwide Television News Corporation; Worldwide Television News France S.A.R.L.; Worldwide Television News GmbH; Worldwide Television News (U.K.) Ltd.

For Petitioner Wayne T. Satz: None

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Children's Institute International, Inc. ("CII"), Kathleen MacFarlane, Capital Cities/ABC, Inc. ("ABC"), and Wayne Satz hereby petition this Court to issue a writ of certiorari to review a decision of the Ninth Circuit Court of Appeals, issued July 1, 1992. Co-defendants County of Los Angeles, City of Manhattan Beach, and Robert Philibosian have filed a separate petition for review of the Ninth Circuit's decision.

Reversing a judgment of the District Court, the Ninth Circuit held that plaintiff Peggy McMartin Buckey could allege a claim under 42 U.S.C. § 1983 for alleged violations of substantive due process and equal protection rights based on allegations that Buckey was singled out for an allegedly unfounded criminal prosecution.

The Ninth Circuit's decision conflicts not only with decisions of several Circuit Courts, but also with decisions of this Court. In addition, the Ninth Circuit's opinion will open federal court doors

to every defendant acquitted in a criminal prosecution, notwithstanding the presence of constitutionally adequate procedural safeguards and prior state court findings of probable cause to proceed with a prosecution. Review by this Court is appropriate.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, filed February 19, 1992, is attached as Appendix A. An amended opinion of the Ninth Circuit was filed July 1, 1992, and is reported at 968 F.2d 791 (9th Cir. 1992). It is attached as Appendix B. The unpublished decision of the United States District Court for the Central District of California, entered September 28, 1990, is attached to this Petition as Appendix C.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its original decision on February 19, 1992. Petitioners timely filed petitions for rehearing and suggestions for rehearing en banc. The Ninth Circuit filed an amended decision on July 1, 1992. This Petition for Writ of Certiorari was filed within 90 days of the filing of the Ninth Circuit's amended decision, and is therefore timely under 28 U.S.C. § 2101(c), and Supreme Court rule 13.4. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AMENDMENT INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTE INVOLVED

Section 1979 of the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983, provides in relevant part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the Untied States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

This case arises from the widely-followed McMartin Preschool child molestation prosecution. Plaintiff Peggy McMartin Buckey, a co-owner of and teacher at the McMartin Preschool in Manhattan Beach, California, was arrested in 1984 after the Grand Jury found that there was sufficient evidence to convict her of crimes of child molestation. Represented by counsel, Buckey requested and received a preliminary hearing, the purpose of which, under California law, was to determine whether probable cause existed to prosecute her for the crimes charged. Buckey's preliminary hearing — the longest in California history — lasted eighteen months, after which the California Municipal Court ruled that there was probable cause to proceed with Buckey's prosecution.

After a trial that lasted almost three years, Buckey was acquitted on certain charges, and a mistrial was declared as to another in which the jury failed to reach a verdict. The District Attorney elected not to proceed with the charge as to which a mistrial had been declared.

Buckey then filed the instant lawsuit. Her complaint alleged that, based on the false report of an allegedly paranoid Preschool parent, the City set off a panic by sending letters to all Preschool parents alerting them to possible child abuse at the Preschool; that CII and McFarlane, having been retained by the City and

County to interview students of the Preschool and motivated by financial concerns, improperly interviewed the children and falsely reported that children had been abused; that the District Attorney, Philibosian, motivated by a desire for publicity, presented Buckey's name to the Grand Jury and that, thereafter, deputy district attorneys under his control misled the Grand Jury and the Municipal Court into finding that there was probable cause to believe Buckey had committed the crimes charged; and that ABC and its reporter, Satz, wanting to sell a sensational story, conspired in and encouraged the prosecution by extensively reporting on the City's and County's investigation and prosecution of plaintiff. *See* 968 F.2d at 792-93.

A. District Court Proceedings

Buckey filed her complaint on January 19, 1990, alleging a federal claim under Section 1983, as well as state law claims for common law conspiracy, malicious prosecution and defamation. On August 6, 1990, all petitioners except Satz (whom plaintiff had belatedly served and who had not yet responded to the complaint) moved to dismiss Buckey's complaint on the grounds that the Section 1983 claim failed to allege a constitutional injury, and that the state law claims lacked federal subject matter jurisdiction. On September 28, 1990, the District Court dismissed Buckey's Section 1983 claim with prejudice because "there is no way that Plaintiff can state a claim that her constitutionally protected rights were violated by any of the moving defendants." The District Court dismissed the state law claims without prejudice for lack of federal jurisdiction. Plaintiff and Satz then stipulated that the District Court's order should apply with the "same force and effect" to Satz as it applied to the other defendants for purposes of appeal.

B. Court of Appeals Proceedings

Buckey appealed the District Court's dismissal of her Section 1983 claim to the Court of Appeals for the Ninth Circuit. Buckey did not make any substantial argument that the District Court erred by dismissing her substantive due process claim, nor did her brief make any argument that her equal protection rights were

violated. Rather, Buckey's appeal focused almost exclusively on her purported procedural due process claim, and on her claim that she was unconstitutionally defamed.

The Ninth Circuit reversed the dismissal with prejudice of Buckey's substantive due process and equal protection claims without the benefit of briefing by the parties on the issues that it found controlling. With respect to Buckey's due process claim, the court held that, despite the fact that plaintiff "was afforded ample due process at the state level [and that] the preliminary hearing and trial cannot be faulted from a procedural point of view," plaintiff's allegations could state a claim for deprivation of "substantive due process rights." The court held that such a claim would be based on the allegation that "defendants, for their various reasons, conspired to attempt to send [Buckey] to jail for child molestation, in the course of which great injury was suffered by her." 968 F.2d at 794-95.

The Ninth Circuit purported to rely on its prior decision in *Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc), which had held that allegations of a conspiracy between governmental and private parties to "distort[ ] and corrupt[ ] the processes of the law" supported a *procedural* due process claim. The Court ruled, however, that in light of recent Supreme Court authority, *Bretz* could no longer be viewed a procedural due process case (despite the fact that *Bretz* was "framed in the language of procedural due process [and had] been interpreted as a procedural due process case"), but, instead, would henceforth have to be considered a decision involving "equal protection or substantive due process." 968 F.2d at 794 and n.3. This ruling is in conflict with numerous decisions of this Court and the other Courts of Appeals.

With respect to the equal protection claim, the court did not require that the plaintiff allege "class-based" discrimination. Instead, the court held that allegations that defendants "conspired under the color of state law to subject Buckey to the hardships and injuries which she suffered" stated a claim for denial of the equal protection of the laws. 968 F.2d at 794-95.

Unsupported by citation of case law, the court's equal protection holding quoted the legislative history of 42 U.S.C. § *1981*: "the inhabitants of every race and color . . . shall have . . . full and equal benefit of all laws *and proceedings* for the security of persons and property, and shall be subject *to the like punishment, pains, and penalties, and to none other* . . . ." (emphasis added by the Ninth Circuit). Based solely on this quotation of legislative history, the court reasoned that the Equal Protection Clause is violated when a person does not receive the full benefit of legal "proceedings" enjoyed by other citizens, or is subject to a "punishment, pain, or penalty" by improper conduct of a government actor to which other citizens were not subjected. The Ninth Circuit neither distinguished, nor even acknowledged, numerous contrary decisions of other Circuits.

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit's Erroneous Holding on Buckey's Substantive Due Process Claim Must Be Reviewed.

The Ninth Circuit's substantive due process[1] holding should be reviewed because it conflicts with decisions of this Court and the decisions of other Courts of Appeals. *See DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 194, 109 S.Ct. 998, 1002 (1989) (certiorari is appropriate in light of the "inconsistent approaches taken by the lower courts in determining when, if ever, [alleged governmental misconduct]

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[1]Courts have used the term "substantive due process" to mean both extra-textual rights (such as the right to be free from undue governmental interference with a decision to have an abortion), as well as other express constitutional protections incorporated through the Fourteenth Amendment's Due Process Clause (such as the Eighth Amendment's right to be free from cruel and unusual punishment). *See Mann v. City of Tucson, Dept. of Police*, 782 F.2d 790, 796 (9th Cir. 1986) (Sneed, J., concurring); *Augustine v. Doe*, 740 F.2d 322 (5th Cir. 1984). In discussing substantive due process in this case, the Ninth Circuit appears to have been referring to an extra-textual right to be free from certain government conduct.

constitutes a violation of the individual's [constitutional] rights, and the importance of the issue to the administration of state and local governments") (citation omitted).

In a nutshell, criminal law enforcement is a field blanketed with express procedural and substantive protections provided by federal and state law.[2] The question petitioners ask this Court to decide is whether, under the rationales of this Court's recent decisions in *Collins v. City of Harker Heights Tex.*, ____ U.S. ____, 112 S.Ct. 1061, 1071 (1992), and *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865 (1989), federal courts may rely on

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[2]For example, the United States Constitution expressly affords criminal defendants the rights to be free from "unreasonable searches and seizures" (Fourth Amendment), to be free from being "held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" (Fifth Am.), to be free from being tried for the "same offense . . . twice" (Fifth Am.), to be free from being "compelled . . . to be a witness against himself" (Fifth Am.), to "a speedy and public trial" (Sixth Am.), to be tried by an "impartial jury" (Sixth Am.), to be tried in the "district wherein the crime shall have been committed" (Sixth Am.), "to be informed of the nature and cause of the accusation" (Sixth Am.), "to be confronted with witnesses against him" (Sixth Am.), "to have compulsory process for obtaining witnesses in his favor" (Sixth Am.), "to have the Assistance of Counsel for his defence" (Sixth Am.), to be free from "Excessive bail," "excessive fines," and "cruel and unusual punishments" (Eight Am.), and to be free from being deprived of "life, liberty, or property, without due process of law." (Fourteenth Am.)

At the time of the alleged misconduct in this case, California law further provided several additional procedural protections to make sure that criminal prosecutions were based on probable cause. California law provided that, in cases that proceeded by way of Grand Jury indictment, an indictment could be returned only after a finding that there was sufficient evidence to convict the defendant of the crimes charged. Cal. Pen. Code § 939.8. A criminal defendant could move to set aside the indictment if the indictment were not based on probable cause. Cal. Pen. Code § 995(a)(1)(b). Moreover, a post-indictment preliminary hearing was available to determine if probable cause existed to maintain the prosecution, and to "weed out" "unwarranted prosecutions" inspired "by malicious motives." *Jaffe v. Stone*, 18 Cal.2d 146, 150 114 P.2d 935 (1941).

"substantive due process" to fashion a remedy for alleged misconduct by state actors in the context of law enforcement, such as when a state actor is alleged to have brought an unfounded criminal prosecution.

This Court has previously ruled that where a state actor is alleged to have engaged in misconduct in violation of state law, the claim should be analyzed *only* to determine whether the alleged misconduct violates *procedural* due process, or an *express* substantive protection offered by another amendment (*e.g.*, the Fourth Amendment's protection against unreasonable searches and seizures, or the Eighth Amendment's protection against cruel and unusual punishments).[3] With one exception that has been substantially overruled,[4] this Court has not used "substantive due

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[3]In *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689 (1979), the Court held that an individual who was arrested pursuant to a facially valid warrant, but mistakenly kept in custody for three days despite repeated protests of mistaken identity, could not allege a due process violation, absent a showing that the *procedures* applicable to the individual's case had not met constitutional requirements. In *Hudson v. Palmer*, 468 U.S. 517, 532, 104 S.Ct. 3194, 3203 (1984), this Court expanded on *McCollan*'s reasoning by holding that, where prescribed procedures were adequate but not followed, if the government supplied an adequate post-deprivation remedy, no due process claim could be stated. In *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975 (1990), the Court held that *Hudson* applied to deprivations of liberty and analyzed an alleged liberty deprivation (six month's confinement in a psychiatric hospital without consent) as a procedural due process claim. *See also Ingraham v. Wright*, 430 U.S. 651, 674, 97 S.Ct. 1401, 1414 (1977) (analyzing claim based on school's decision "to punish a child for misconduct by restraining the child and inflicting appreciable physical pain" as procedural due process claim).

[4]In *Rochin v. California*, 342 U.S. 165, 174, 72 S.Ct. 205, 210-11 (1952), the Court held, in a case where state actors obtained evidence from a defendant by forcibly opening his mouth and pumping his stomach, that such conduct "shock[ed] the conscience" and that "the conviction [was] obtained by methods that offend the Due Process Clause." *Rochin*, however, was implicitly overruled by *Graham v. Connor*, 109 S.Ct. at 1871, to the extent that *Rochin* approved the application of a substantive due process analysis to alleged misconduct

process" to provide a remedy for instances of individualized misconduct by state actors in the context of law enforcement.[5] This Court's decision in *Graham v. Connor* is only the most recent in the long line of cases beginning with *Baker v. McCollan* and continued in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908 (1981), that have abided by the foregoing analysis.[6]

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by government agents in seizing evidence. In *Graham*, this Court held: "Today we make explicit what was implicit in *Garner*'s analysis, and hold that *all* claims that law enforcement officers have used excessive force — deadly or not — in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Id.*

[5]This Court, to the extent it has recognized "substantive" due process claims, has generally interpreted the substantive component of the Due Process Clause only to limit what state *legislatures* can do, not to provide a remedy for alleged misconduct by individual state actors. *E.g., Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625 (1923) (invalidating state law prohibiting teaching of German in schools on the grounds that "liberty may not be interfered with . . . by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect"); *Pierce v. Society of the Sisters et al.*, 268 U.S. 510, 534-36, 45 S.Ct. 571, 573-74 (1925) (holding state law prohibiting parents from sending children to private schools unconstitutional as an "arbitrary" infringement of the "liberty of parents and guardians to direct the upbringing and education of children"); *Griswold v. Connecticut*, 381 U.S. 479, 481-83, 85 S.Ct. 1678, 1680-81 (1965) (invalidating state law prohibiting use of birth control); *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 1824 (1967) (finding unconstitutional statute prohibiting mixed racial marriages); *Carey v. Population Services Intern.*, 431 U.S. 678, 684-86, 97 S.Ct. 2010, 2015-17 (1977) (overturning state law prohibiting distribution of contraceptives to minors); *Foucha v. Louisiana*, 112 S.Ct. 1780, 1785-89 (1992) (holding unconstitutional state law allowing for continued confinement in mental institution until detainee could prove sanity); *Planned Parenthood of Southeastern Penn. v. Casey*, 112 S.Ct. 2791, 2804-08 (1992) (invalidating spousal consent requirement for abortions).

[6]*Graham* further stated that the analysis under Section 1983 "begins by identifying the specific constitutional right allegedly infringed," and held that, while the Fourth Amendment generally governs pre-arrest

There is good reason for a rule that conduct cannot form the basis for a "substantive" due process violation, where the conduct is "unauthorized" in the sense that it is not carried out pursuant to a state statute (and thus the conduct is not a reflection of state policy but, instead, contravenes well-defined state policy). *See also Parratt*, 101 S.Ct. at 1916-17 (finding no due process violation where "the deprivation did not occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the state to follow established state procedure."). The essential inquiry in a substantive due process analysis has been to examine whether the state, in making a *policy* decision, has a sufficient interest to justify invading a protected liberty interest.[7] When state actors are alleged to have breached duties under state law (such as by bringing a baseless prosecution), the federal constitution and state law have already prescribed adequate protections to safeguard the individual's due process interests, and federal courts do not need to use substantive due process to "bar" a state from doing what the state is already barred from doing. *See Collins v. City of Harker Heights Tex.*, 112 S.Ct. at 1071 (holding that substantive due process did not provide a remedy to the widow of a state worker for the state's alleged indifference to the worker's safety resulting in the worker's death, because the field already was

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conduct and the Eighth Amendment governs post-arrest "punitive" conduct, substantive due process may not be used to fill in gaps between coverage provided by constitutional amendments. 109 S.Ct. at 1870 and n.10; *see Bell v. Wolfish*, 441 U.S. 520, 533, 99 S.Ct. 1861 (1979) (holding that pretrial detainee cannot be punished unless the detainee has received *procedural* due process protections).

[7] *E.g., Pierce v. Society of Sisters*, 45 S.Ct. at 571 (overturning state prohibition on private schools because law has "no reasonable relation to some purpose within the competency of the state"); *see also Washington v. Harper*, 494 U.S. 210, 220, 110 S.Ct. 1028, 1036 (1990) (holding, in a case involving a law permitting the administration of antipsychotic drugs against prisoner's will, that "the substantive issue involves a definition of the protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it").

covered by other law); *cf. Daniels v. Williams*, 474 U.S. 327, 331-32, 106 S.Ct. 662, 665-66 (1986) (noting that due process "bar[s] certain *government* actions regardless of the fairness of the procedures used to implement them" (emphasis added)).

Breaking new ground, the Ninth Circuit has seen fit in this case to provide a "substantive due process" remedy, even though the state itself already provided a pre-deprivation hearing to prevent the alleged injury, and a post-deprivation remedy in the form of a tort claim. Indeed, the Ninth Circuit expressly disclaimed any intention to base its analysis on procedural due process, stating:

> "Buckey, to repeat, was afforded ample due process at the state level. She received its full benefits resulting in her acquittal. The preliminary hearing and the trial itself cannot be faulted from a procedural point of view."

968 F.2d at 795. Moreover, rather than grounding its holding in the express protection of some specific constitutional right, the Ninth Circuit instead ruled that Buckey could state a claim for violation of her "substantive due process rights"[8] based on an amorphous, non-textual right to be free from the alleged "conspir[acy] to attempt to send her to jail for child molestation." 968 F.2d at 794.[9]

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[8]It appears that the Ninth Circuit felt compelled to rely on substantive due process in *Buckey* because California's pre-deprivation hearing and post-deprivation remedy alleviated any procedural due process concerns.

[9]The Ninth Circuit's decision also conflicts with "substantive" due process decisions of this Court which have recognized absolutely protected liberty interests in only two specific areas. In *Planned Parenthood v. Casey*, ____ U.S. ____, 112 S.Ct. 2791, 2806-07 (1992), this Court summarized the cases as providing "constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education, . . . as well as [to] bodily integrity." Although the decisions summarized in *Planned Parenthood* might not properly be viewed as creating "substantive" due process rights (but instead might be viewed as decisions implicating other amendments), to the extent they have recognized fundamental rights protected by substantive due process guarantees, they have recognized those rights only in narrowly

Virtually all prior Circuit Court decisions have focused their analyses on whether an alleged malicious prosecution violates the accused's procedural due process rights or substantive rights protected by another amendment. Even within that analysis, the Courts have fractured significantly in their holdings. Some hold that malicious prosecution does not implicate procedural due process concerns at all because the Fourteenth Amendment does not require that criminal prosecutions be based on probable cause[10]; others appear to reach a contrary conclusion that malicious prosecution violates the accused's procedural due process rights regardless whether the state provides a post-

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circumscribed areas not expressly reached by other amendments. This Court has never held that a liberty interest absolutely protected by substantive due process guarantees entitles individuals to "uncorrupted" and "undistorted" judicial processes. Indeed, this Court has exhibited extreme reluctance to create new areas of absolutely protected liberty interests. *See Collins*, 112 S.Ct. at 1071 (rejecting proposed substantive due process right to receive adequate employment training). The Ninth Circuit, by recognizing a new fundamental right, has disregarded the Supreme Court's approach in this area.

[10]*See Gunderson v. Schlueter*, 904 F.2d 407, 409 (8th Cir. 1990) (rejecting a due process claim because "[t]he Constitution does not mention malicious prosecution, nor has [plaintiff] cited a case or statute establishing a federal action for malicious prosecution. In fact, this and other circuits are uniform in holding that malicious prosecution by itself is not punishable under section 1983 because it does not allege a constitutional injury"); *Coogan v. City of Wixom*, 820 F.2d 170, 174-75 (6th Cir. 1987) ("Even if plaintiff had been able to establish all the elements for a claim of malicious prosecution, his proper avenue of relief was the state tort action only, not a claim under § 1983"); *Friedman v. Village of Skokie*, 763 F.2d 236, 239 (7th Cir. 1985) ("the common law tort of malicious prosecution does not give rise to a federal constitutional wrong remedied by 42 U.S.C. § 1983. Parties who have suffered tortious injury are not entitled to § 1983 relief merely because of the fact that the defendant is a governmental official"); *Cramer v. Crutchfield*, 648 F.2d 943, 945 (4th Cir. 1981) ("The § 1983 claim for malicious prosecution and abuse of process was also properly rejected. A valid cause of action under § 1983 is not alleged simply by the assertion that a common law tort was committed by a state official").

deprivation remedy[11]; and still others hold that malicious prosecution would violate procedural due process, but for the availability of a post-deprivation remedy.[12] Thus, the Circuit Courts were split three ways even before the Ninth Circuit's holding, but the Ninth Circuit has now aggravated the disagreement by holding that malicious prosecution violates *substantive* due process when "corruptions and distortions" of the "judicial processes" are alleged.[13]

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[11]*See Jennings v. Shuman*, 567 F.2d 1213, 1220 (3d Cir. 1977) (holding that "an abuse of process [i.e., the initiation of prosecution for an improper purpose] is by definition a denial of procedural due process"); *Hand v. Gary*, 838 F.2d 1420, 1426 (5th Cir. 1988) (holding that "bad faith prosecution violates constitutional rights" because the Fourteenth Amendment "imposes a duty on state prosecutors to charge only upon ascertaining probable cause"); *Strength v. Hubert*, 854 F.2d 421, 426 (11th Cir. 1988) (relying on *Hand v. Gary* and holding that due process guarantees "the right to be free of malicious prosecution"). *See also Brummett v. Camble*, 946 F.2d 1178, 1180 and n.2 (5th Cir. 1991) *cert. denied* 112 S.Ct. 2323 (1992) ("malicious prosecution can form the basis of a § 1983 claim").

[12]*Johnson v. Barker*, 799 F.2d 1396, 1400 (9th Cir. 1986) ("malicious prosecution does not ordinarily constitute a valid procedural due process claim if process is available within the state judicial system to remedy such wrongs"); *Bacon v. Patera*, 772 F.2d 259, 264 (6th Cir. 1985) ("if [defendant's] actions were only 'random and unauthorized [citing *Hudson v. Palmer*], Bacon would then have to show that state remedies are inadequate"); *Norton v. Liddel*, 620 F.2d 1375, 1378 (10th Cir. 1980) ("We do not believe that the Fourteenth Amendment or the Civil Rights Act were designed to redress injuries incurred by reason of unfounded or malicious claims/suits brought in State court, where adequate State remedies are available to the aggrieved parties").

[13]Some courts, purporting to rely on language from *Rochin v. California*, have theorized that "conscience shocking" conduct by the government in the context of an allegedly malicious prosecution could violate substantive due process. *See Gunderson v. Schlueter*, 904 F.2d at 409-10 (stating that, for an alleged malicious prosecution to support a Section 1983 claim, the plaintiff could allege either that appropriate procedures were not followed, or conduct that "shocks the conscience"); *Torres v. Superintendent*, 893 F.2d 404, 410 (1st Cir. 1990) ("[f]or

The conflict between the Ninth Circuit's *Buckey* decision and the approaches of other Circuit Courts is exemplified by a comparison of *Buckey* and *Torres v. Superintendent of Police of Puerto Rico*, 893 F.2d 404, 410-11 (1st Cir. 1990). In *Torres*, a group of former police officers alleged that other members of the police department conspired to frame them on criminal charges and that, by presenting false testimony, the defendants fraudulently procured a finding of probable cause at a preliminary hearing. The First Circuit held that "[f]or procedural due process purposes in a claim of malicious prosecution, the plaintiff must show the alleged conduct deprived him of liberty by distortion and corruption of the processes of law, *i.e.*, corruption of witnesses, falsification of evidence, or some other egregious conduct resulting in a denial of a fair trial. [Citations omitted.]" *Id.* Thus, the First Circuit in *Torres* held that precisely the sort of alleged conduct at issue in *Bretz* and in this case should be analyzed for violations of *procedural* due process, which it found lacking because of the adequacy of a post-deprivation remedy for malicious prosecution available under Puerto Rico law. *Id.* In contrast, the Ninth Circuit found a substantive due process violation

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substantive due process purposes, the alleged malicious prosecution must be conscience-shocking"); *Barnier v. Szentmiklosi*, 810 F.2d 594, 599-600 (6th Cir. 1987) (theorizing that a plaintiff could allege a substantive due process violation if the conduct at issue was "conscience shocking"); *Johnson v. Barker*, 799 F.2d at 1400 (holding that the conduct at issue "was [not] so egregious as to 'shock the conscience.' "). Most of these courts have found that "conscience-shocking" cannot be found in the absence of physical brutality or racial motivations. *E.g.*, *Torres*, 893 F.2d at 410 (summarizing that "[w]here plaintiff has not been physically abused, detained, or prosecuted due to racial or political motivation . . . courts are reluctant to find 'conscience-shocking' conduct"). Petitioners submit that each of these decisions, to the extent each theorizes that a substantive due process claim could exist, is in conflict with the restrictions on substantive due process claims imposed by this Court, as discussed above. *See also Braley v. City of Pontiac*, 906 F.2d 220, 226 (6th Cir. 1990) ("After *Graham*, the status of the 'shock the conscience' test in contexts other than allegations of excessive force is uncertain"). In any event, however, none of these courts has found a substantive due process violation based on an allegedly "conscious-shocking" malicious prosecution.

despite the existence of a pre-deprivation hearing and a post-deprivation remedy.

The Ninth Circuit's *Buckey* decision should be reviewed for reasons wholly apart from the benefit of resolving the manifest conflict among the Circuit Courts.[14] First, the decision leaves the parties in this case without any way of knowing the elements of the Ninth Circuit's new substantive due process claim. The court's decision appears to hold that the Fourteenth Amendment is violated when (a) there is a conspiracy between private parties and the government, which causes (b) a "corruption" and (c) a "distortion" of (d) the "processes of law." The parties have no way of knowing what constitutes a corruption or a distortion, and which processes of law must be corrupted or distorted for a claim to be proved. Unless these issues are addressed by state law or by some other constitutional amendment (a proposition that the Ninth Circuit, by affirming the dismissal of the procedural due process claim, implicitly rejected), there is no way to know what the elements of the claim are.

In light of the foregoing, the Ninth Circuit's decision has tremendous implications for the district courts. Under the Ninth Circuit's analysis, the federal courts will be called upon to define on a case by case basis the elements of "corruption," "distortion," and "processes of law." Their decisions will be unbounded by any constitutional text or other relevant guideposts. Rather, each judge will decide whether a plaintiff has alleged sufficient facts to constitute a "corruption" or a "distortion" of some arbitrarily-determined "judicial processes." The Ninth Circuit's creation of a novel substantive due process claim is unworkable.[15]

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[14]Assuming this Court resolves the split created by the Ninth Circuit's ruling on the substantive due process issue, it should take the further step to resolve the three-way split as to whether malicious prosecution violates procedural due process. *See Camble v. Brummett*, 112 S.Ct. 2323, 2324 (1992) (White, J., dissenting from the denial of certiorari) ("I would grant certiorari to determine if a cause of action for malicious prosecution is available under section 1983").

[15]Notably, the few Circuits that have speculated the malicious prosecution could violate substantive due process if it "shocks the con-

Moreover, the Ninth Circuit's holding should be reviewed for the additional reason that it has the potential to turn every malicious prosecution claim into a Section 1983 action. Under the Ninth Circuit's decision, every criminal defendant who is acquitted can now get past the pleading stage in a federal court civil rights action by alleging that he was the victim of a conspiracy "to attempt to send [him] to jail . . . ." *See* 968 F.2d at 794. Plaintiffs will always allege that prosecutors who interview witnesses before trial have "conspired" to "corrupt" the witnesses' testimony. The Ninth Circuit's decision threatens to chill the vigor with which difficult or controversial criminal prosecutions will be pursued, and to inundate federal courts with claims adequately addressed under state law.

B. This Court Should Correct The Ninth Circuit's Erroneous Holding on Buckey's Equal Protection Claim.

This Court should review the Ninth Circuit's equal protection holding because it runs contrary to decisions of this Court, squarely conflicts with decisions of other federal Circuit Courts of Appeals, and has the potential to turn virtually every purported malicious prosecution claim into a Section 1983 claim.

The Ninth Circuit did not require as an element of plaintiff's equal protection claim that she allege her membership in a discrete minority, or that the defendants' alleged wrongs were

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science" have not applied a uniform analysis based on objective criteria. *See, e.g., Barnier*, 810 F.2d at 599. The only court that tried to apply some objective boundaries to the "shocks the conscience" test, *Torres v. Superintendent*, essentially held that the hypothesized substantive due process claim was unnecessary. In *Torres*, the First Circuit noted that malicious prosecution would only be "conscience-shocking" if it involved (a) physical brutality, (b) racial motivation, or (c) political motivation. 893 F.2d at 410. These circumstances would likely all be covered by other express constitutional protections — under *Graham*, physical violence in the course of a prosecution would be analyzed under the Fourth Amendment or the Eighth Amendment; a racially-motivated prosecution would be analyzed as a denial of equal protection; and a prosecution aimed to silence a political viewpoint would run afoul of the First Amendment.

motivated by her membership in *any* class; indeed the complaint contained no such allegations. The court's holding that plaintiff stated an equal protection claim is therefore in conflict with a number of this Court's decisions. *See DeShaney v. Winnebago County Department of Social Services*, 109 S.Ct. at 1004 and n.3 (holding that the state's failure to provide protective services to a specific individual did not violate equal protection guarantees so long as the state did not "selectively deny its protective services to certain disfavored minorities"); *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 264-65, 97 S.Ct. 555, 563-64 and nn.10-13, and 566 and n.21 (1977) (requiring proof of *invidious* discrimination to establish equal protection violation, and interpreting "invidious" purpose to include intent to discriminate on basis of race); *Paul v. Davis*, 424 U.S. 693, 700, 96 S.Ct. 1155, 1160 (1976) (holding that a government actor's intent to injure a person does not necessarily mean that the victim "is deprived of any right protected or secured by the Constitution or laws of the United States"). *Cf. Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613, 107 S.Ct. 2022, 2028 and n.5 (1987) (holding that 42 U.S.C. § 1981 precludes discrimination based on ethnicity, race, and ancestry).

The general rule followed by this Court has been that, to state an equal protection claim, a plaintiff must *at least* allege class-based discrimination. *See also United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825, 850, 103 S.Ct. 3352 (1983) (Blackmun, J., dissenting) ("[T]he intended victims must be victims not because of any personal malice the conspirators have toward them, but because of their membership in or affiliation with a particular class. Moreover, the class must exist independently of the defendants' actions; that is, it cannot be defined simply as the group of victims of the tortious action."); *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439-41, 105 S.Ct. 3249, 3254-55 (1985) (holding that a statute that discriminates on its face against mentally handicapped people without sufficient justification violates the equal protection clause); *cf. Yick Wo v. Hopkins*, 118 U.S. 356, 374, 6 S.Ct. 1064, 1073 (1886) (holding that a law that is neutral on its face but applied in a manner to discriminate against an individual because of ancestry without sufficient justification, violates the equal

protection clause). The Ninth Circuit's decision conflicts with these decisions of this Court because it purports to allow Buckey to state an equal protection claim without requiring any allegation that the alleged "invidious" discrimination was motivated by a class-based animus.

For the same reason, the Ninth Circuit's decision squarely conflicts with decisions of the Courts of Appeals for the Second, Fifth, Sixth and Seventh Circuits, which have held that, in order to state a claim under the Equal Protection Clause based on improper government conduct, a person must at least allege that he was mistreated because of his membership in a discrete class. For example, in *Huebschen v. Dept. of Health & Social Services*, 716 F.2d 1167, 1170-72 (7th Cir. 1983), the plaintiff alleged that he had been denied equal protection when he was fired from his government job. The Seventh Circuit Court of Appeals dismissed the equal protection claim because the plaintiff "merely alleged that he was treated unfairly as an individual" and failed to allege "intentional discrimination against him because of his membership in a particular class." The court summarized: "we simply are not persuaded that the Equal Protection Clause should protect . . . a class [defined as the victims of allegedly wrongful conduct by a state actor]." *Id.* at 1172.[16]

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[16]*See also Rattner v. Netburn*, 733 F.Supp. 162, 163-64 (S.D.N.Y. 1989) (holding that an equal protection claim was not stated where the plaintiff failed to show he was discriminated against because of his membership in discrete class), *aff'd in part and vacated in part*, 930 F.2d 204 (2d Cir. 1991) (affirming dismissal of equal protection claim); *Johnson v. Morel*, 876 F.2d 477, 479 (5th Cir. 1989) ("To state a claim under the Equal Protection Clause, a § 1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class"); *Beker Phosphate Corp. v. Muirhead*, 581 F.2d 1187, 1189 (5th Cir. 1978) (rejecting claim that corporate landowners were "denied the equal protection of the law in their right to follow orderly procedures promulgated with regard to the approval of land use" where state actors allegedly maliciously used state legal procedures to harass plaintiffs); *Bacon v. Patera*, 772 F.2d 259, 264 (6th Cir. 1985) (holding that for security guard to state a constitutional claim based on alleged malicious prosecution, plaintiff had to allege that defendant had an established procedure of targeting security officers

The Ninth Circuit's equal protection holding should be reviewed because of the conflict in the Circuits that it creates. Moreover, the holding threatens to provide a federal court lawsuit to all criminal defendants who are acquitted, as any defendant who is made to stand trial can allege that he was singled out to be maliciously prosecuted and thereby denied "the full and equal benefit of all laws and proceedings . . . ." 968 F.2d at 795.

C. The Ninth Circuit's Failure To Accord Collateral Estoppel Effect To The State Court's Probable Cause Finding Requires Reversal.

The Ninth Circuit *sub silentio* rejected the argument that the Municipal Court's finding of probable cause after a full and fair preliminary hearing forecloses Buckey's Section 1983 claim. While this Court has not yet ruled on the precise issue raised here, the most analogous decision, *Allen v. McCurry*, 449 U.S. 90, 94-96, 103-04, 191 S.Ct. 411 (1980), appears to be in conflict. In *Allen*, this Court held that state law governs whether a state court finding is given collateral estoppel effect in a Section 1983 action. The Court also held that if the state would give a decision of its criminal courts collateral estoppel effect, then the decision that would have "binding effect" in a Section 1983 claim when the "state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights." *Id.* at 420. The Ninth Circuit's holding is in conflict with *Allen*, because it fails even to analyze whether, under California law, the Municipal Court's finding precludes Buckey's malicious prosecution claim. Had it engaged in the appropriate analysis, the

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generally for unlawful conduct "to harass them and force them out of business"); *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1481 (7th Cir. 1990) (holding that, "to assert a constitutional claim based on violation of equal protection, a complaining party must assert disparate treatment based upon their membership in a particular group"); *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1305 and n.10 (9th Cir. 1989) (holding that allegations of theft and fraud by court appointed receiver do not support a claim for violation of the victim's equal protection rights).

Ninth Circuit would have had to rule that the probable cause finding at the preliminary hearing barred Buckey's claim.

The general rule under California law is that a decision in a criminal proceeding cannot be collaterally attacked. Buckey's principal argument against application of collateral estoppel was that, because of the alleged presentation of false evidence, she was denied a full and fair opportunity to litigate the probable cause issue at her preliminary hearing. Under California law, however, a litigant cannot seek to relitigate a judicial finding by claiming that false evidence was presented. *See Kachig v. Boothe*, 22 Cal.App.3d 626, 637, 99 Cal.Rptr. 393 (1971) ("[i]f it were permitted that a litigant could maintain an action to overthrow a judgment upon the ground that perjured testimony had been employed against him, or upon any other ground than extrinsic fraud, litigation would have no end"); *accord Eichman v. Fotomat Corp.*, 147 Cal.App.3d 1170, 1176, 197 Cal.Rptr. 612 (1983). Indeed, it would defy fundamental principles of judicial efficiency and finality to permit Buckey to recall each witness, including numerous children, who testified at her eighteen-month preliminary hearing, and again to cross-examine each to determine whether each witness had been telling the truth or had, instead, given perjured testimony.

The Ninth Circuit's refusal to accord collateral estoppel effect to the Municipal Court's probable cause finding is also in conflict with decisions of the First, Sixth, Seventh, and Eighth Circuits, all of which accord binding effect to state laws holding that a probable cause finding is given collateral estoppel effect; those Courts have accordingly held that such a finding bars a subsequent federal court claim based on a lack of probable cause. In *Torres v. Superintendent*, 893 F.2d at 411 and n.11, the First Circuit held that even if no post-deprivation remedy existed and a due process claim could therefore be stated, a finding of probable cause by the state court in the criminal action would bar the claim. In *Coogan v. City of Wixom*, 820 F.2d at 175, the Sixth Circuit held that a judicial finding of probable cause at a preliminary hearing, after the accused not only had a "full and fair opportunity" under state law to litigate the issue of probable cause but, in fact, litigated the issue, "foreclose[s] relitigation of that

finding in a subsequent § 1983 action." In *Guenther v. Holmgreen*, 738 F.2d 879 (7th Cir. 1984), *cert. denied*, 469 U.S. 1212, 105 S.Ct. 1182 (1985), the Seventh Circuit held that where a criminal defendant litigates at a preliminary hearing the issue of probable cause for an arrest, a finding of probable cause bars a subsequent civil rights claim based on an alleged malicious prosecution. In *Gunderson v. Schlueter*, 904 F.2d at 409, the Eighth Circuit affirmed the dismissal of a Section 1983 claim purportedly based on an alleged malicious prosecution, where the state court judge "in good faith found probable cause, a finding later confirmed in a pre-trial hearing."[17]

This Court should review the Ninth Circuit's collateral estoppel holding not only because it conflicts with decisions of other Circuits, but because of its practical implications on this case. The decision, which appears to allow for relitigation of the state court's probable cause finding, will require the re-cross-examination of numerous child witnesses to determine if they were telling the truth at Buckey's preliminary hearing and trial.

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[17] *See also McCarthy v. Mayo*, 827 F.2d 1310, 1316-17 (9th Cir. 1987) (holding that a Grand Jury finding of probable cause for an indictment barred a later state law malicious prosecution claim and, apparently, a federal Section 1983 claim as well); *McGowan v. City of San Diego*, 208 Cal.App.3d 890, 896, 256 Cal.Rptr. 537 (1989), *review denied* (relying on *Guenther* and holding that a criminal defendant's unsuccessful motion to suppress alleging lack of probable cause to arrest precluded the defendant's subsequent civil claim, because the "probable cause in the criminal proceeding is identical to the probable cause required in a later civil complaint"). *Cf. Schertz v. Waupaca County*, 875 F.2d 578, 581 (7th Cir. 1989) (holding that, because a "John Doe proceeding" under Wisconsin law is not intended to determine whether in fact probable cause for a prosecution exists, but, instead, whether there is sufficient evidence for a finding of probable cause, a finding against the accused at the John Doe proceeding would not foreclose a later Section 1983 action).

CONCLUSION

Petitioners respectfully submit that their Petition for Writ of Certiorari should be granted.

Respectfully, submitted,

September 28, 1992

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No. 90-56333.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT.

PEGGY MCMARTIN BUCKEY,
Plaintiff-Appellant,

v.

COUNTY OF LOS ANGELES; CITY OF MANHATTAN BEACH; ROBERT PHILIBOSIAN; CHILDREN'S INSTITUTE INTERNATIONAL; WAYNE T. SATZ; CAPITAL CITIES/ ABC, INC.; KATHLEEN "KEE" MACFARLANE,
Defendants-Appellees.

Argued and Submitted Nov. 7, 1991,
Decided Feb. 19, 1992.

Teacher acquitted in highly publicized child molestation case brought § 1983 action against city, county, county district attorney, child abuse investigation institute, child abuse investigator, television company, and television reporter, alleging that policies and actions of these defendants deprived her of her rights to due process, privacy, equal protection, and fair trial contrary to Fourteenth Amendment. Defendants moved to dismiss. The United States District Court, Central District of California, Richard A. Gadbois, Jr., J., granted motion, denying leave to amend. Teacher appealed. The Court of Appeals, Sneed Circuit Judge, held that: (1) complaint which alleged that defendants had improper motives for pursuing child molestation case failed to state cause of action under § 1983, and (2) teacher was granted opportunity to amend pleadings in light of possibility that she could assert claim that defendants conspired under color of state law to subject her to hardships and injuries which she suffered in violation of substantive due process and equal protection.

Reversed and remanded.

1. *Federal Courts — 776*

Dismissal for failure to state claim is ruling on question of law and as such is reviewed de novo. Fed.Rules Civ.Proc. Rule 12(b)(6), 28 U.S.C.A.

2. *Federal Civil Procedure — 1829*

Review of dismissal for failure to state claim is based on contents of complaint. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

3. *Federal Civil Procedure — 1829*

In reviewing dismissal for failure to state claim, all allegations of material fact are taken as true and construed in light most favorable to nonmoving party. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

4. *Civil Rights — 234*

Civil rights complaints are to be liberally construed. 42 U.S.C.A. § 1983.

5. *Civil Rights — 235(5)*

Complaint which alleged that city, county, county district attorney, child abuse investigator, television company, and television reporter had improper motives for pursuing child molestation case against preschool teacher and that she was deprived of her rights to due process, privacy, equal protection, and fair trial contrary to Fourteenth Amendment failed to state cause of action under § 1983. U.S.C.A. Const.Amends. 5, 6, 14; 42 U.S.C.A. § 1983.

6. *Civil Rights — 110*

Mere negligence and self-aggrandizing motives are not actionable under § 1983, 42 U.S.C.A. § 1983.

7. *Federal Civil Procedure — 839*

Preschool teacher acquitted in highly publicized child molestation case was granted opportunity to amend her pleadings in light of possibility that she could assert claim under § 1983 that city, county, district attorney, child abuse investigation institute, child abuse investigator, television company, and television reporter conspired under color of state law to subject her to hardships and injuries which she suffered in violation of substantive due process

and equal protection. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

8. *Civil Rights — 115*

Business and reputation losses alone do not constitute "plus" that is required to transform ordinary defamation claim into § 1983 claim. 42 U.S.C.A. § 1983.

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Appeal from the United States District Court for the Central District of California.

Before SNEED, BEEZER and THOMPSON, Circuit Judges.

SNEED, Circuit Judge:

Peggy McMartin Buckey, acquitted in the highly publicized McMartin Preschool child molestation case, appeals the dismissal with prejudice of her 42 U.S.C. § 1983 action against the City of Manhattan Beach, Los Angeles County, Robert Philibosian, Los Angeles County District Attorney, Children's Institute International (CII), child abuse investigation specialists, Kathleen "Kee" MacFarlane, CII investigative social worker, television company Capital Cities/ABC, Inc., and ABC reporter Wayne T. Satz. Buckey alleges, in effect, that but for the policies and actions of the defendants, her life would not have been ruined by the McMartin Preschool prosecution. The trial court found that there was no possible theory under which Buckey's allegations could amount to a cognizable claim. We reverse and remand to allow Buckey to amend her pleadings.

I.

FACTS AND PROCEEDINGS BELOW

The facts, as set forth in Buckey's complaint, are as follows: Buckey co-owned and taught at the highly regarded Virginia McMartin Preschool in Manhattan Beach, California. In 1983, a person known to be paranoid and otherwise mentally ill alleged to the Manhattan Beach police that her child had been sexually molested while attending the McMartin Preschool. The police sent letters to all McMartin Preschool parents, which resulted in a waive of unfounded abuse allegations. The ensuing city and county investigation was improperly delegated to CII, with Kee MacFarlane as principal investigator. MacFarlane had no relevant academic, professional, or technical licenses or credentials. CII and MacFarlane proceeded seriously to mishandle the investigation, so as to violate established guidelines for child abuse investigation and to cause the children to fabricate testimony and fantasize experiences of abuse that had never occurred. The County, acting through Philibosian, accepted the CII investigation as basis for launching a prosecution against Buckey and others. Meanwhile, MacFarlane leaked the story to Satz at ABC, where it was disseminated to the public.

Buckey alleges that several defendants had improper motives that led them to pursue the McMartin case despite the lack of factual foundation for doing so. CII needed to unearth a scandal to save its business from bankruptcy. Philibosian needed ammunition for an upcoming election battle. Capital Cities/ABC wanted to sell a sensational story, and was willing to go beyond the bounds of responsible journalism to do so.[1] In other words, Capital Cities/ABC created rather than simply reported the news.

After her acquittal on all criminal charges, Buckey brought this action in federal district court. She alleged section 1983 violations and pendent state law claims, and sought upwards of $1 million in

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[1]Buckey's complaint alleges a conspiracy among the City, County, CII, MacFarlane, Satz, and ABC to disclose the McMartin affair prior to Buckey's indictment. A romantic liaison between MacFarlane and Satz is asserted in Buckey's appellate brief, but not in her complaint.

damages. Her complaint stated that, without limitation, she was deprived of her rights to due process, privacy, equal protection, and a fair trial contrary to the Fourteenth Amendment. The defendants moved to dismiss under Fed.R.Civ.P. Rule 12(b)(6) for failure to state a claim.[2] The trial court observed that the preliminary hearing that led to Buckey's being bound over for criminal trial had lasted 18 months. This indicated that the prosecution had probable cause for proceeding with the McMartin criminal case. The court further noted that Buckey had been acquitted, and so could not complain she had not received a fair trial. Finally, the court expressed its sympathy that Buckey was properly "very, very upset" by what had happened to her, but stated that "being very, very upset does not state a cause of action under [section] 1983." The court dismissed Buckey's section 1983 action with prejudice, denying leave to amend, and dismissed the pendent state law claims without prejudice

II.

JURISDICTION AND STANDARD OF REVIEW

[1-4] We have jurisdiction pursuant to 28 U.S.C. § 1291. A dismissal for failure to state a claim is a ruling on a question of law and as such is reviewed de novo. *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir.1989), *cert. denied*, ____ U.S. ____, 110 S.Ct. 3217, 110 L.Ed.2d 664 (1990). Review is based on the contents of the complaint. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir.1989). A complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Id.* (quotation omitted). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Id.* Civil rights complaints are to be liberally construed. *Gobel v. Maricopa County*, 867 F.2d 1201, 1203 (9th Cir.1989).

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[2]Defendant Satz did not appear at the hearing on the motions to dismiss. By stipulation of the parties, the motions to dismiss apply with the same force and effect as to Satz as to the other defendants.

III.

ANALYSIS

[5, 6] Buckey's vague and conclusory complaint "aims in the general direction of the federal Constitution with buckshot." *Chiplin Enter. v. City of Lebanon,* 712 F.2d 1524, 1526 (1st Cir.1983). It describes her misfortunes and the persons she believed caused them, but in no way does Buckey adequately plead injuries cognizable under section 1983. Mere negligence and self-aggrandizing motives are not actionable under section 1983. *Daniels v. Williams,* 474 U.S. 327, 333, 106 S.Ct. 662, 666, 88 L.Ed.2d 662 (1986); *see, e.g., Johnson v. Barker,* 799 F.2d 1396, 1400 (9th Cir.1986) (alleged politically motivated prosecution did not give rise to valid § 1983 due process claim). Nor does the complaint allege specific facts to support the existence of a conspiracy among the defendants. *See Burns v. County of King,* 883 F.2d 819, 821 (9th Cir.1989). As it stands, Buckey's complaint cannot survive a motion to dismiss. The only issue we confront is whether we should remand to permit Buckey to amend her pleadings.

[7] We would be justified in doing this only if there is a distinct claim cognizable in a federal court and consistent with the facts and allegations set forth in her complaint that she might plead. We believe one such claim may exist. It is that all the parties described in the complaint conspired under the color of state law to subject Buckey to the hardships and injuries which she suffered. We express no opinion on whether such a claim ethically and professionally can be filed. We only indicate that it is a possibility.

This putative claim would not be addressed to a deprivation under color of state law of procedural due process, but rather would assert that due process was unconstitutionally denied "regardless of the purity of the procedures themselves." *Mann v. City of Tucson, Dept. of Police,* 782 F.2d 790, 798 (9th Cir.1986) (Sneed, J., concurring in the result). Because the claim would not be based in procedural due process, the question of the adequacy of post-deprivation remedies, so important in section 1983 cases involving only procedural due process deprivations, would be

irrelevant. *Zinermon v. Burch,* 494 U.S. 113, 125-26, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990); *Sierra Lake Reserve v. City of Rocklin,* 938 F.2d 951, 957 (9th Cir.1991).

Under the putative claim, Buckey, like the plaintiff in *Bretz v. Kelman,* 773 F.2d 1026, 1031 (9th Cir.1985) (en banc),[3] would assert that the defendants, for their various reasons, conspired to attempt to send her to jail for child molestation, in the course of which great injury was suffered by her. The claim would not be that Buckey did not receive adequate procedural protections. Rather, as pointed out earlier, the claim would be that the procedures that ultimately established Buckey's innocence were made necessary only because of a wrongful conspiracy of entities and persons acting under the color of state law. The focus would be on a denial of equal protection of the laws, a wrong quite familiar to those in Congress who in 1866 enacted the first civil rights act and promulgated the Fourteenth Amendment. *See, e.g.,* Cong. Globe, 39th Cong., 1st Sess. 211 (1866) (describing civil rights bill S. 61: "the inhabitants of every race and color . . . shall have . . . full and equal benefit of all laws and *proceedings* for the security of persons and property, and shall be subject *to like punishment, pains, and penalties, and to none other. . . .*" (Emphasis added)).

Buckey, to repeat, was afforded ample due process at the state level. She received its full benefits resulting in her acquittal. The preliminary hearing and the trial itself cannot be faulted from a procedural point of view.

[8] Nor can Buckey successfully urge that she suffered injury because of so-called "defamation plus" by those acting under color of state law. *See Paul v. Davis,* 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). Business and reputation losses alone do

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[3]The court's analysis in *Bretz* is to some extent framed in the language of procedural due process, *see id.,* and the case has been interpreted as a procedural due process case, *see, e.g., Johnson v. Barker,* 799 F.2d at 1400. However, *Bretz* was decided without the benefit of *Zinermon's* three-prong typology of § 1983 due process claims, 494 U.S. at 125-26, 110 S.Ct. at 983, and it is most properly analyzed as a case involving the denial of equal protection or substantive due process.

not constitute the "plus" that is required to transform an ordinary defamation claim into a section 1983 claim. *Cooper v. Dupnik*, 924 F.2d 1520, 1534 (9th Cir.1991), *reh'g en banc ordered*, 933 F.2d 798 (9th Cir.1991). To state a defamation-plus claim, Buckey must join a defamation claim to a recognizable section 1983 wrong such as the denial of equal protection and substantive due process here hypothesized.

We conclude that Buckey should be given the opportunity to amend her complaint.

REVERSED and REMANDED.

No. 90-56333.

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

PEGGY MCMARTIN BUCKEY,
Plaintiff-Appellant

v.

COUNTY OF LOS ANGELES; CITY OF MANHATTAN BEACH; ROBERT PHILIBOSIAN; CHILDREN'S INSTITUTE INTERNATIONAL; WAYNE T. SATZ; CAPITAL CITIES/ ABC, INC.; KATHLEEN "KEE" MACFARLANE,
Defendants-Appellees.

Argued and Submitted Nov. 7, 1991.
Decided Feb. 19, 1992.

As Amended on Denial of Rehearing and Rehearing En Banc July 1, 1992.

Teacher acquitted in highly publicized child molestation case brought § 1983 action against city, county, county district attorney, child abuse investigation institute, child abuse investigator, television reporter, alleging that policies and actions of these defendants deprived her of her rights to due process, privacy, equal protection, and fair trial contrary to Fourteenth Amendment. Defendants moved to dismiss. The United States District Court, Central District of California, Richard A. Gadbois, Jr., J., granted motion, denying leave to amend. Teacher appealed. The Court of Appeals, Sneed, Circuit Judge, held that: (1) complaint which alleged that defendants had improper motives for pursuing child molestation case failed to state cause of action under § 1983, and (2) teacher was granted opportunity to amend pleadings in light of possibility that she could assert claim that defendants conspired under color of state law to subject her to hardships and injuries which she suffered in violation of substantive due process and equal protection.

Reversed and remanded.

Opinion, 957 F.2d 652, superseded.

1. *Federal Courts — 776*

Dismissal for failure to state claim is ruling on question of law and as such is reviewed de novo. Fed.Rules Civ.Proc. Rule 12(b)(6), 28 U.S.C.A.

2. *Federal Civil Procedure — 1829*

Review of dismissal for failure to state claim is based on contents of complaint. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

3. *Federal Civil Procedure — 1829*

In reviewing dismissal for failure to state claim, all allegations of material fact are taken as true and construed in light most favorable to nonmoving party. Fed.Rules Civ.Proc.Rule 12(b)(6) 28 U.S.C.A.

4. *Civil Rights — 234*

Civil rights complaints are to be liberally construed. 42 U.S.C.A. § 1983.

5. *Civil Rights — 235(5)*

Complaint which alleged that city, county, county district attorney, child abuse investigation institute, child abuse investigator, television company, and television reporter had improper motives for pursuing child molestation case against preschool teacher and that she was deprived of her rights to due process, privacy, equal protection, and fair trial contrary to Fourteenth Amendment failed to state cause of action under § 1983. U.S.C.A. Const.Amends. 5, 6, 14; 42 U.S.C.A. § 1983.

6. *Civil Rights — 110*

Mere negligence and self-aggrandizing motives are not actionable under § 1983. 42 U.S.C.A. § 1983.

7. *Federal Civil Procedure — 839*

Preschool teacher acquitted in highly publicized child molestation case was granted opportunity to amend her pleadings in light of possibility that she could assert claim under § 1983 that city, county, district attorney, child abuse investigation institute, child abuse investigator, television company, and television reporter conspired under color of state law to subject her to hardships and injuries which she suffered in violation and substantive due process and equal protection. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

8. *Civil Rights — 115*

Business and reputation losses alone do not constitute "plus" that is required to transform ordinary defamation claim into § 1983 claim. 42 U.S.C.A. § 1983.

William H. Waysman, James H. Davis, Los Angeles, Cal., for plaintiff-appellant.

Roger H. Granbo, Deputy County Counsel, Los Angeles, Cal., Jeffrey L. Garland, Cotkin, Collins & Franscell, Santa Ana, Cal., Charles P. Diamond, O'Melveny & Meyers, Gregory J. Aldisert, Philip W. Boesch, Jr., Kinsella, Boesch, Fujikawa & Towle, Mark B. Helm, Munger, Tolles & Olson, Los Angeles, Cal., for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before: SNEED, BEEZER, and THOMPSON, Circuit Judges.

SNEED, Circuit Judge:

Peggy McMartin Buckey, acquitted in the highly publicized McMartin Preschool child molestation case, appeals the dismissal with prejudice of her 42 U.S.C. § 1983 action against the City of Manhattan Beach, Los Angeles County, Robert Philibosian, Los Angeles County District Attorney, Children's Institute International (CII), child abuse investigation specialists, Kathleen "Kee" MacFarlane, CII investigative social worker, television

company Capital Cities/ABC, Inc., and ABC reporter Wayne T. Satz. Buckey alleges, in effect, that but for the policies and actions of the defendants, her life would not have been ruined by the McMartin Preschool prosecution. The trial court found that there was no possible theory under which Buckey's allegations could amount to a cognizable claim. We reverse and remand to allow Buckey to amend her pleadings.

I.

FACTS AND PROCEEDINGS BELOW

The facts, as set forth in Buckey's complaint, are as follows: Buckey co-owned and taught at the highly regarded Virginia McMartin Preschool in Manhattan Beach, California. In 1983, a person known to be paranoid and otherwise mentally ill alleged to the Manhattan Beach police that her child had been sexually molested while attending the McMartin Preschool. The police sent letters to all McMartin Preschool parents, which resulted in a wave of unfounded abuse allegations. The ensuing city and county investigation was improperly delegated to CII, with Kee MacFarlane as principal investigator. MacFarlane had no relevant academic, professional, or technical licenses or credentials. CII and MacFarlane proceeded seriously to mishandle the investigation, so as to violate established guidelines for child abuse investigation and to cause the children to fabricate testimony and fantasize experiences of abuse that had never occurred. The County, acting through Philibosian, accepted the CII investigation as basis for launching a prosecution against Buckey and others. Meanwhile, MacFarlane leaked the story to Satz at ABC, where it was disseminated to the public.

Buckey alleges that several defendants had improper motives that led them to pursue the McMartin case despite the lack of factual foundation for doing so. CII needed to unearth a scandal to save its business from bankruptcy. Philibosian needed ammunition for an upcoming election battle. Capital Cities/ABC wanted to sell a sensational story, and was willing to go beyond the

bounds of responsible journalism to do so.[1] In other words, Capital Cities/ABC created rather than simply reported the news.

After her acquittal on all criminal charges, Buckey brought this action in federal district court. She alleged section 1983 violations and pendent state law claims, and sought upwards of $1 million in damages. Her complaint stated that, without limitation, she was deprived of her rights to due process, privacy, equal protection, and a fair trial contrary to the Fourteenth Amendment. The defendants moved to dismiss under Fed.R.Civ.P.Rule 12(b)(6) for failure to state a claim.[2] The trial court observed that the preliminary hearing that led to Buckey's being bound over for criminal trial had lasted 18 months. This indicated that the prosecution had probable cause for proceeding with the McMartin criminal case. The court further noted that Buckey had been acquitted, and so could not complain she had not received a fair trial. Finally, the court expressed its sympathy that Buckey was properly "very, very upset" by what had happened to her, but stated that "being very, very upset does not state a cause of action under [section] 1983." The court dismissed Buckey's section 1983 action with prejudice, denying leave to amend, and dismissed the pendent state law claims without prejudice.

II.

JURISDICTION AND STANDARD OF REVIEW

[1-4] We have jurisdiction pursuant to 28 U.S.C. § 1291. A dismissal for failure to state a claim is a ruling on a question of law and as such is reviewed de novo. *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir.1989), *cert. denied*, 496

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[1]Buckey's complaint alleges a conspiracy among the City, County, CII, MacFarlane, Satz, and ABC to disclose the McMartin affair prior to Buckey's indictment. A romantic liaison between MacFarlane and Satz is asserted in Buckey's appellate brief, but not in her complaint.

[2]Defendant Satz did not appear at the hearing on the motions to dismiss. By stipulation of the parties, the motions to dismiss apply with the same force and effect as to Satz as to the other defendants.

U.S. 937, 110 S.Ct. 3217, 110 L.Ed.2d 664 (1990). Review is based on the contents of the complaint. *Love v. United States,* 915 F.2d 1242, 1245 (9th Cir.1989). A complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Id.* (quotation omitted). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Id.* Civil rights complaints are to be liberally construed. *Gobel v. Maricopa County,* 867 F.2d 1201, 1203 (9th Cir.1989).

III.

ANALYSIS

[5, 6] Buckey's vague and conclusory complaint "aims in the general direction of the federal Constitution with buckshot." *Chiplin Enter. v. City of Lebanon,* 712 F.2d 1524, 1526 (1st Cir.1983). It describes her misfortunes and the persons she believed caused them, but in no way does Buckey adequately plead injuries cognizable under section 1983. Mere negligence and self-aggrandizing motives are not actionable under section 1983. *Daniels v. Williams,* 474 U.S. 327, 333, 106 S.Ct. 662, 666, 88 L.Ed.2d 662 (1986); *see, e.g., Johnson v. Barker,* 799 F.2d 1396, 1400 (9th Cir.1986) (alleged politically motivated prosecution did not give rise to valid § 1983 due process claim). Nor does the complaint allege specific facts to support the existence of a conspiracy among the defendants. *See Burns v. County of King,* 883 F.2d 819, 821 (9th Cir.1989). As it stands, Buckey's complaint cannot survive a motion to dismiss. The only issue we confront is whether we should remand to permit Buckey to amend her pleadings.

[7] We would be justified in doing this only if there is a distinct claim cognizable in a federal court and consistent with the facts and allegations set forth in her complaint that she might plead. We believe one such claim may exist. It is that all the parties described in the complaint conspired under the color of state law to subject Buckey to the hardships and injuries which she suffered. We express no opinion on whether such a claim

ethically and professionally can be filed. We only indicate that it is a possibility.

This putative claim would not be addressed to a deprivation under color of state law of procedural due process, but rather would assert that due process was unconstitutionally denied "regardless of the purity of the procedures themselves." *Mann v. City of Tucson, Dept. of Police,* 782 F.2d 790, 798 (9th Cir.1986) (Sneed, J., concurring in the result). Because the claim would not be based in procedural due process, the question of the adequacy of post-deprivation remedies, so important in section 1983 cases involving only procedural due process deprivations, would be irrelevant. *Zinermon v. Burch,* 494 U.S. 113, 125-26, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990); *Sierra Lake Reserve v. City of Rocklin,* 938 F.2d 951, 957 (9th Cir.1991).

Under the putative claim, Buckey, like the plaintiff in *Bretz v. Kelman,* 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc),[3] would assert that the defendants, for their various reasons, conspired to attempt to send her to jail for child molestation, in the course of which great injury was suffered by her. The claim would not be that Buckey did not receive adequate procedural protections. Rather, as pointed out earlier, the claim would be that the procedures that ultimately established Buckey's innocence were made necessary only because of a wrongful conspiracy of entities and persons acting under the color of state law. The focus would be on a denial of equal protection of the laws, a wrong quite familiar to those in Congress who in 1866 enacted the first civil rights act and promulgated the Fourteenth Amendment. *See, e.g.,* Cong.Globe, 39th Cong., 1st Sess. 211 (1866) (describing civil rights bill S. 61: "the inhabitants of every race and color . . . shall have . . . full and equal benefit of all laws *and proceedings* for the

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[3]The court's analysis in *Bretz* is to some extent framed in the language of procedural due process, *see id.,* and the case has been interpreted as a procedural due process case, *see, e.g., Johnson v. Barker,* 799 F.2d at 1400. However, *Bretz* was decided without the benefit of *Zinermon's* three-prong typology of § 1983 due process claims, 494 U.S. at 125-26, 110 S.Ct. at 983, and it is most properly analyzed as a case involving the denial of equal protection or substantive due process.

security of persons and property, and shall be subject *to like punishment, pains, and penalties, and to none other. . . .*" (emphasis added)).

Buckey, to repeat was afforded ample due process at the state level. She received its full benefits resulting in her acquittal. The preliminary hearing and the trial itself cannot be faulted from a procedural point of view.

[8] Nor can Buckey successfully urge that she suffered injury because of so-called "defamation plus" by those acting under color of state law. *See Paul v. Davis,* 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). Business and reputation losses alone do not constitute the "plus" that is required to transform an ordinary defamation claim into a section 1983 claim. *Cooper v. Dupnik,* 924 F.2d 1520, 1534 (9th Cir. 1991), *rev'd on other grounds,* 963 F.2d 1220 (9th Cir.1992) (en banc). To state a defamation-plus claim, Buckey must join a defamation claim to a recognizable section 1983 wrong such as the denial of equal protection and substantive due process here hypothesized.

We conclude that Buckey should be given the opportunity to amend her complaint. Nothing in this opinion is intended to foreclose any claim of immunity from liability under section 1983 that can be raised by any party to the amended complaint of the appellant.

REVERSED and REMANDED.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PEGGY MCMARTIN BUCKEY,
Plaintiff,

vs.

COUNTY OF LOS ANGELES, CITY OF MANHATTAN BEACH, ROBERT PHILIBOSIAN, CHILDREN'S INSTITUTE INTERNATIONAL, KATHLEEN "KEE" MACFARLANE, CAPITAL CITIES/ABC, INC., and WAYNE T. SATZ,
Defendants.

CASE NO. CV 90 0293 RG (GHKx)

ORDER

On August 6, 1990, in Courtroom 16 in the above-entitled court, the Motions to Dismiss Plaintiff's Complaint pursuant to the Federal Rules of Civil Procedure, Rule 12(b)(6), filed by Defendants COUNTY OF LOS ANGELES and ROBERT PHILIBO-

OSIAN, CITY OF MANHATTAN BEACH, CHILDREN'S INSTITUTE INTERNATIONAL and KATHLEEN "KEE" MACFARLANE, and CAPITAL CITIES/ABC, INC., came on regularly for hearing.

Appearing for Plaintiff PEGGY MCMARTIN BUCKEY was William H. Waysman. Appearing for Defendants COUNTY OF LOS ANGELES and ROBERT PHILIBOSIAN was De Witt W. Clinton, County Counsel, by Robert H. Granbo, Deputy County Counsel, and John A. Daly of Chase, Rotchford, Drukker & Bogust. Appearing for Defendant CITY OF MANHATTAN BEACH was David D. Lawrence of Cotkin, Collins and Franscell. Appearing for Defendants CAPITAL CITIES/ABC, INC. was Bradley S. Phillips and Robert N. Treiman of Munger, Tolles and Olson. Appearing for Defendants CHILDREN'S INSTITUTE INTERNATIONAL and KATHLEEN "KEE" MACFARLANE was Lisa M. Jacobsen of O'Melveny and Meyers. There were no other appearances.

After consideration of the moving papers, the oppositions thereto, the replies to the oppositions, and oral argument of counsel, the Court orders as follows:

1. Plaintiff's claim for Violation of Civil Rights under 42 U.S.C. Section 1983 is dismissed with prejudice. The Plaintiff has not stated a claim, and there is no way that the Plaintiff can state a claim that her constitutionally protected rights were violated by any of the moving Defendants.

2. Plaintiff's state claims for Common Law Conspiracy, Malicious Prosecution, and Defamation are dismissed without prejudice as there is no longer a federal claim to which they may be appended.

IT IS SO ORDERED.

DATED: September 27, 1990

RICHARD A. GADBOIS, JR.
United States District Judge